

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARGARET GREENE and the SAMISH  
INDIAN TRIBE,

Plaintiffs,

v.

BRUCE BABBITT, Secretary of the Interior,  
et al,

Defendants.

No. C89-645Z

ORDER

This matter comes before the Court on a Motion for Relief From Judgment and Orders Under Fed. R. Civ. P. 60(b) by the Tulalip Tribes, Lummi Nation, Swinomish Indian Tribal Community, and Upper Skagit Indian Tribes (the "Four Tribes"), docket no. 345, and a Motion for Immediate Relief From Judgment and Order also filed by the Four Tribes, docket no. 346. In Response, the Samish Indian Nation ("Samish") have filed a Motion to Dismiss, docket no. 352. Samish has not responded separately to either of the Four Tribes' Motions. The Court having considered the motions for relief filed by the Four Tribes and the motion to dismiss by Samish, as well as the Response, Reply, and supporting declarations, hereby DENIES the Four Tribes' Motion for Relief From Judgment Under Fed. R. Civ. P.

1 60(b), docket no. 345, and DENIES the Tribes' Motion for Immediate Relief From Judgment  
2 and Order, docket no. 346. The Court GRANTS the Samish Indian Nation's Motion to  
3 Dismiss, docket no. 352.

4 The Samish Nation argues that the Tribes' Motion for Motion for Immediate Relief  
5 From Judgment and Order, docket no. 346, is an independent action requiring a separate  
6 basis for the subject matter of the suit. Samish contends that its sovereign immunity is  
7 jurisdictional, and deprives the Court of jurisdiction over the relief sought by the Four Tribes  
8 in the motion. See Motion to Dismiss, docket no. 352, at 2. In the Motion for Immediate  
9 Relief, the Four Tribes' seek a determination that the Tribes are not bound by the Judgment  
10 entered after recognition of Samish, an order voiding the post-recognition Order and  
11 Judgment, and an order correcting "clerical mistakes" in the post-recognition Order and  
12 Judgment under Rule 60(a). See Motion for Immediate Relief, docket no. 346, at 1-2. The  
13 Motion for Relief under Fed. R. Civ. P. 60(b) seeks relief from various orders of the Court,  
14 including the denial of intervenor status and the post-recognition Order and Judgment. See  
15 Motion for Relief under Fed. R. Civ. P. 60(b), docket no. 345. Samish and the Four Tribes  
16 dispute whether tribal sovereign immunity bars the relief requested by the Four Tribes.

17 Federally recognized Indian tribes are immune from unconsented suit. Chemehuevi  
18 Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1050-53 (9th Cir. 1985).  
19 Samish argues that it has not expressly waived sovereign immunity from suit; an implied  
20 waiver of sovereign tribal immunity is not permitted. See id. at 1052-53. As a general  
21 proposition, the Four Tribes do not contest the tribal status of Samish or its right to assert  
22 tribal sovereign immunity.

23 In Response to Samish's Motion to Dismiss, the Four Tribes argue that "[a]s with any  
24 motion in the course of litigation, no independent basis for jurisdiction is needed . . ."  
25 Tribes' Resp., docket no. 361, at 5. However, the Four Tribes were not parties in the  
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1 underlying litigation, were denied intervenor status, and were not permitted to litigate in this  
 2 case. Samish urges that the Four Tribes are without standing to file motions in this case.

3 Sovereign immunity is a jurisdictional issue. Samish contends that the lack of consent  
 4 deprives the Court of jurisdiction. See Cherokee Nation of Oklahoma v. Babbitt, 117 F.3d  
 5 1489, 1498-99 (D.C. Cir. 1997). The Four Tribes contend that their claims for relief are  
 6 within the Court's subject matter jurisdiction because "Samish waived its sovereign  
 7 immunity from the claims in the motions when it filed this action and, after its recognition,  
 8 sought post-recognition relief." Tribes' Resp., docket no. 361, at 10. The Four Tribes also  
 9 contend that where an aspect of federal recognition is at issue sovereign immunity may not  
 10 be raised. Id. at 10 n.4 (citing Cherokee Nation, 117 F.3d at 1499). However, the Four  
 11 Tribes concede they are not challenging Samish's recognition, and concede Samish's  
 12 sovereign immunity. If the Samish Tribe retains its sovereign immunity, it is not subject to  
 13 suit by other Indian tribes, the States, or private individuals and entities. Because Samish did  
 14 not waive its sovereign immunity as to the Four Tribes, this Court lacks subject matter  
 15 jurisdiction over the Four Tribe's various claims raised in the Motion for Immediate Relief,  
 16 docket no. 346.<sup>1</sup>

17 In addition, the Four Tribes were not parties in the underlying action and there is no  
 18 basis for their Rule 60(b) motion. See Kem Mfg. Corp. v. Wilder, 817 F.2d 1517, 1520-21  
 19 (11th Cir. 1987). This Court and the Ninth Circuit have repeatedly distinguished federal  
 20 recognition from treaty status and fishing rights. Greene v. Lujan, No. C89-645Z, 1992 WL  
 21 533059 (W.D. Wash. Feb.25, 1992), aff'd, Greene v. Babbitt, 64 F.3d 1266 (9th Cir. 1995).

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 25 <sup>1</sup> The Four Tribes also ask the Court to revise factual findings in the 1996 order as  
 26 "clerical mistakes" pursuant to Fed. R. Civ. P. 60(a). However, the substantive revisions  
 advocated by the Four Tribes are not "clerical mistakes" as that term is used in Rule 60(a). See,  
e.g., Waggoner v. R. McGray, Inc., 743 F.2d 643, 645 (9th Cir. 1984) ("error regarding the legal  
 effect of [judgment] was one of law and therefore [could] be corrected only under Rule 60(b)").

1 The Ninth Circuit recognized the distinction in Greene v. United States:

2 We recognize that the [federal acknowledgment and treaty fishing rights] inquiries are  
3 similar. Yet each determination serves a different legal purpose and has an  
4 independent effect. Federal recognition is not a threshold condition a tribe must  
establish to fish under the Treaty of Point Elliott . . . . Similarly, the Samish need not  
assert treaty fishing rights to gain federal recognition.

5 996 F.2d 973, 976-77 (9th Cir.1993). In a subsequent holding, the Ninth Circuit explicitly  
6 noted that the tribal interest “in preventing the Samish from gaining treaty fishing rights was  
7 *not affected by this litigation*, involving federal tribal recognition . . .” Greene v. Babbitt, 64  
8 F.3d 1266, 1270 (9th Cir. 1995) (emphasis added). Most recently, in United States v.  
9 Washington, the Ninth Circuit again spoke on this issue as it related to fishing rights:

10 We held that although the federal recognition and treaty fishing rights inquiries were  
11 similar, “each determination serves a different legal purpose and has an independent  
12 legal effect.” We noted that even if the Samish achieved federal recognition, the tribe  
would need to challenge the decision in Washington II before it could exercise fishing  
rights.

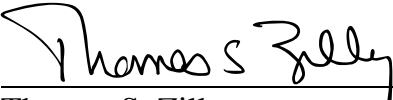
13 394 F.3d 1152, 1156 (9th Cir. 2005) (internal citations omitted).

14 The Four Tribes were not parties in this litigation. Greene v. United States, 996 F.2d  
15 973 (9th Cir. 1993); Greene v. Babbitt, 64 F.3d 1266, 1271 (9th Cir. 1995). The Four Tribes  
16 do not have standing to file under Rule 60(b) and cannot challenge the Judgment ten years  
17 after it was entered. Federal recognition has a legal effect that is independent of treaty  
18 fishing rights and treaty status. Accordingly, the Four Tribes’ Motion for Relief From  
19 Judgment Under Fed. R. Civ. P. 60(b), docket no. 345, is DENIED.

20 The Tribes’ Motion for Immediate Relief From Judgment and Order, docket no. 346,  
21 is in effect a new independent action for which there is no subject matter jurisdiction. The  
22 Samish Indian Nation has not consented to suit by the Four Tribes and Samish sovereign  
23 immunity prevents this Court from considering the merits of the Four Tribes request for  
24 relief. Accordingly, the Court DENIES the Motion for Immediate Relief, docket no. 346.  
25 The Samish’s Motion to Dismiss, docket no. 352, is GRANTED.

1 IT IS SO ORDERED.

2 DATED this 26th day of January, 2007.

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5 Thomas S. Zilly  
6 United States District Judge  
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